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TWO CONCEPTIONS OF THE NINTH AMENDMENT

RANDY E. BARNETT*

The Ninth Amendment has been largely ignored by the Supreme Court of the United States. Because the Ninth Amendment is unquestionably a part of our written Constitution, ignoring it would not have been possible without some theory that renders it without any function. This paper will first examine this theory, which is based on what I call the "rights-powers conception" of constitutional rights, a conception of constitutional rights that is applied only to the Ninth Amendment. Then I will describe an alternative to this view of the Ninth Amendment, one that is based on what I call the "power-constraint conception" of constitutional rights, the conception that we normally use with constitutional rights. Lastly I will briefly address the topic of this part of the Symposium: "The Ninth Amendment and its Relationship to Natural Rights."

THE RIGHTS-POWERS CONCEPTION OF THE NINTH AMENDMENT

The rights-powers conception stipulates that the rights "retained by the people" are nothing other than the exact converse of the powers granted to the national government. This view was put forward in 1980 by Raoul Berger¹ and most recently by Charles Cooper in his article, "Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons."² As Cooper explains: "A ninth amendment claim against *federal* action . . . is determined by the extent of the federal government's enumerated powers. . . ."³

Far from being a "forgotten lesson," however, the rights-powers conception has been explicitly used by the Supreme Court to interpret the Ninth Amendment. As Justice Reed wrote in the 1947 case of *United Public Workers v. Mitchell*:

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1. See Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980).

2. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J. LAW & POL. 63 (1987).

3. *Id.* at 78.

The powers granted by the Constitution to the Federal Government are subtracted from the totality of sovereignty originally in the states and the people. Therefore, when objection is made that the exercise of a federal power infringes upon rights reserved by the Ninth and Tenth Amendments, the inquiry must be directed toward the granted power under which the action of the Union was taken. If granted power is found, necessarily the objection of invasion of those rights, reserved by the Ninth and Tenth Amendments, must fail.⁴

There are three serious problems with this interpretation of the Ninth Amendment.

First, this interpretation treats the Ninth and Tenth Amendments as exactly the same. The Tenth Amendment reads:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people.⁵

The idea that animates the rights-powers conception that powers not delegated are reserved is clearly expressed here. If the only intention of the Framers was to state the theory of enumerated powers, the Tenth Amendment was entirely sufficient to the task. There was absolutely no need for another amendment written confusingly in terms of "rights" retained by the people to express exactly the same idea.

The confusion between the Ninth and Tenth Amendments is manifested in Justice Reed's reference to "those rights, reserved by the Ninth and Tenth Amendments. . . ."⁶ The Tenth Amendment, of course, does not speak of *rights* at all, but rather speaks of reserved "powers." And, in his article, Charles Cooper states that "[t]he ninth amendment does not specify what rights it protects other than by *its* reference to the enumerated powers of the federal government."⁷ The Ninth Amendment, of course, does not refer to enumerated powers at all. It is the Tenth Amendment that speaks of "powers not delegated to the United States."

The second problem with the "rights-powers conception" flows from its claim that there can never be a conflict between a constitutional right and a delegated power. If this is correct,

4. 330 U.S. 75, 95-96 (1947).

5. U.S. CONST. amend. X.

6. 330 U.S. 75, 96 (1947) (emphasis added).

7. Cooper, *supra* note 2, at 80 (emphasis added).

then the Ninth Amendment has absolutely no constitutional role. Any claim by an individual or state that the national government had exceeded its enumerated powers would rely entirely upon the provisions enumerating the powers of the national government (to show the absence of a power) and the language of the Tenth Amendment (to show that those powers not delegated are reserved).

The fact that there would be no occasion to use the Ninth Amendment is not the problem. After all, there has been no occasion to enforce the rule requiring the President to be at least thirty-five years old, either. The problem is that a rights-powers conception deprives the Ninth Amendment of any *potential* application. It does not allow for even a *hypothetical* set of facts that would implicate the Ninth Amendment. Of course, it is possible that the Congress approved and the States ratified an amendment that was meant to be inapplicable to any *conceivable* circumstance. However, we cannot prefer such an interpretation of an expressed constitutional enactment if one that contemplates a potential role is also available.

Finally, the rights-powers conception of constitutional rights must apply to enumerated as well as unenumerated rights. According to a rights-powers analysis, by delegating a particular power to the national government, the people necessarily ceded to the general government any rights they previously had that might conflict with such a power. According to this view, the Bill of Rights merely clarified certain of the retained rights and changed nothing. As Raoul Berger states: "Thus viewed, the Bill of Rights added nothing, but was merely declaratory."⁸ Therefore, even an enumerated right should never constrain an enumerated power.⁹

It should come as no surprise that a rights-powers conception is so broad as to deny effect to enumerated as well as unenumerated rights. The rights-powers conception is based on the argument made by some Federalists such as James Wilson and Alexander Hamilton that it was unnecessary to have any enumerated rights because the national government was one of limited and enumerated powers. When this argument was made, the issue of *unenumerated* rights had yet to arise.

8. Berger, *supra* note 1, at 6 (footnote omitted).

9. Charles Cooper's discussion of the First Amendment appears to adopt this interpretive method. See Cooper, *supra* note 2, at 74-75.

Yet the rights-powers argument was not universally accepted by the Framers. When, for example, Thomas Jefferson vigorously objected to this argument in a letter to James Madison,¹⁰ Madison replied that he did not accept the position "in the extent argued by Mr. Wilson. . . ."¹¹ Moreover, the argument that an enumeration of rights was unnecessary was rejected by the electorate when they ratified the Bill of Rights. It is odd indeed to insist that the only proper interpretation of the Bill of Rights is based on the theory used by its most vociferous opponents.

Ironically, the rights-powers conception has been applied only to the Ninth and Tenth Amendments, thereby neutering the very provisions that were inserted to respond to the concerns expressed by Federalists. In contrast, enumerated rights have been used to *limit* in some fashion the exercise of delegated powers. As the Court stated in the 1951 case of *Dennis v. United States*:¹²

The question with which we are concerned here is not whether Congress has such a *power*, but whether the *means* which it has employed conflict with the First and Fifth Amendments to the Constitution.¹³

Once it is conceded that enumerated rights can constrain the exercise of delegated powers, however, it must be explained why a fundamentally different conception of constitutional rights applies to the "retained" rights of the Ninth Amendment. This is particularly awkward in the face of the Ninth Amendment dictate that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."¹⁴ Rendering the Ninth Amendment functionless by applying a rights-power concep-

10. Jefferson wrote:

To say, as Mr. Wilson does that a bill of rights was not necessary because all is reserved in the case of the general government which is not given, while in the particular ones all is given which is not reserved might do for the Audience to whom it was addressed, but is surely gratis dictum, opposed by strong inferences from the body of the instrument, as well as from the omission of the clause of our present confederation which had declared that in expressed terms.

Letter of Thomas Jefferson to James Madison, (Dec. 20, 1787), reprinted in 1 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 606-07 (1971).

11. Letter of James Madison to Thomas Jefferson (Oct. 17, 1788), *id.* at 615.

12. 341 U.S. 494 (1951).

13. *Id.* at 501 (emphasis in original); see also *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) ("Congress . . . must exercise its powers subject to the . . . relevant limitations of the Bill of Rights.").

14. U.S. CONST. amend. IX.

tion only to the rights "retained by the people" surely disparages these rights, if indeed it does not deny them altogether.

THE POWER-CONSTRAINT CONCEPTION OF THE NINTH AMENDMENT

The idea that constitutional rights are simply what is left over after the people have delegated powers flies in the face of the amendments themselves. For example, it is simply impossible to find a right to "a speedy and public trial, by an impartial jury,"¹⁵ a right against double jeopardy or self-incrimination,¹⁶ or a right to be free from "unreasonable searches and seizures"¹⁷ by closely examining the limits of the enumerated powers of the national government. The reason for this is that the delegated powers provisions limit the proper *ends* or scope of federal powers, while these examples of enumerated rights limit the *means* by which the federal government may use those powers that are within its proper scope.

This insight points the way to a different conception of enumerated and unenumerated constitutional rights: the "power-constraint" conception. Madison explained that the proposed amendments had not one, but two distinct purposes: "[T]he great object in view is to limit and qualify the powers of Government, by excepting out of the grant of power those cases in which Government ought not to act, or to act only in a particular mode."¹⁸ One purpose is, then, "to *limit* . . . the powers of government, by excepting out of the grant of power those cases in which Government *ought not to act*" Another purpose is "to . . . *qualify* the powers of Government, by excepting out of the grant of power those cases in which Government ought . . . to act *only in a particular mode*." In other words, a Bill of Rights was meant to constrain the powers of government in two ways—by reinforcing the limitations on the delegated powers of government *and* by placing additional restrictions on the means by which government may pursue its delegated ends.

In explaining the second of these purposes, Madison offers an illuminating example:

15. U.S. CONST. amend. VI.

16. U.S. CONST. amend. V.

17. U.S. CONST. amend. IV.

18. 1 ANNALS OF CONG. 454 (J. Gales & W. Seaton eds. 1834) (Speech of Rep. J. Madison) [hereinafter "Madison"].

The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the direction of the Legislature: may not general warrants be considered necessary for the purpose . . . ? If there was reason for restraining the State Governments from exercising this power, there is like reason for restraining the Federal Government.¹⁹

In addition to supporting the view that constitutional rights were intended, to use Madison's term, "as actual limitations"²⁰ on the exercise of delegated powers, this example also suggests that constitutional rights are especially important because the open-ended language of the Necessary and Proper Clause²¹ heightens the chances that the government may exercise a delegated power in a manner that infringes upon the rights of the people. Even so strong a proponent of the Necessary and Proper Clause as James Madison argued that it increased the need for constitutional rights. "It is true," he told the House,

the powers of the General Government are circumscribed, they are directed to particular objects; but *even if Government keeps within those limits, it has certain discretionary powers with respect to the means, which may admit of abuse to a certain extent, . . .* because in the Constitution of the United States, there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution the powers vested in the Government of the United States, or in any department or officer thereof . . .²²

This quote refutes the claim of Raoul Berger and Charles Cooper that constitutional rights are defined solely by the enumeration of delegated powers. Madison states that "even if Government keeps within those limits, it has certain discretion-

19. *Id.* at 456.

20. Madison's original formulation of what eventually became the Ninth and Tenth Amendments read:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the constitution; but either as *actual limitations of such powers*, or as inserted merely for greater caution.

Id. at 452 (emphasis added).

21. After enumerating specific powers of Congress, the Constitution authorizes the Congress:

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested in this Constitution in the Government of the United States, or in any Department or Officer thereof.

U.S. CONST. art. I, § 8, cl. 18.

22. Madison, *supra* note 18, at 455 (emphasis added).

ary powers with respect to the means, which may admit of abuse to a certain extent . . .” In short, in addition to reinforcing the limitations on delegated power, constitutional rights are also intended to further restrict the means by which the government may pursue its delegated ends.

Even where constitutional rights do simply reinforce the limits of delegated powers, it is dangerously misleading to characterize them as “redundant.” Such a characterization implies that constitutional rights automatically recede as the exercise of governmental powers expands. Of course, *if* the government is held within its enumerated powers, then constitutional rights will not be needed for this purpose. But if the scope of governmental powers is improperly expanded, constitutional rights do not simply recede into oblivion. Rather they serve the same function as the backup safety mechanisms on airplanes. These so-called “redundant” secondary systems are designed to prevent a crash if a primary system fails. Just as redundancy is designed into airplanes for “greater caution,”²³ (to again borrow a phrase from Madison) constitutional rights that reinforce the limitations on governmental powers are an indispensable second line of defense against unwarranted expansions of powers.

To change the analogy, when a ship begins to sink, it would be a non sequitur to argue that one should not use lifeboats and lifepreservers because the designers of the ship’s structure ardently believed such devices were entirely unnecessary. In the same way, when the constitutional structure of enumerated powers no longer effectively prevents violations of individual rights, it is a non sequitur to object to the enforcement of enumerated and unenumerated constitutional rights on the grounds that those who designed the structure of the Constitution as the primary mechanism for protecting individual rights believed that the enforcement of such rights would be unnecessary.

On the issue of whether a Bill of Rights is needed to reinforce the limitations on federal power, history has proved the Federalists wrong and the Antifederalists right. We should be grateful to those who withheld their assent to the Constitution until they were assured that an expressed recognition of consti-

23. See *supra* note 20.

tutional rights was forthcoming and to James Madison who succeeded in persuading a reluctant House of Representatives to take up the issue.

We are now in a position to fully appreciate Madison's statement that:

If a line can be drawn between the powers granted and the rights retained, it would seem to be the same thing, whether the latter to be secured by declaring that they shall not be abridged, or whether the former shall not be extended. If no such line can be drawn, a declaration in either form would amount to nothing.²⁴

Contrary to both Raoul Berger and Charles Cooper, this statement does not unambiguously support a rights-powers conception of constitutional rights. Rather, Madison is saying that there are two ways of limiting the power of government: restrict powers and protect rights. Madison is not suggesting that the latter is derived from the former. Nor is he suggesting that when one of these two mechanisms fails to constrain government, we cannot resort to the other.

According to a power-constraint conception, constitutional rights have two vital functions: (1) they place limits on the means by which delegated powers can be exercised and (2) they provide a back-up mechanism by which government may be held to its proper ends. In part of his original version of what became the Ninth and Tenth Amendments, Madison articulated both aspects of this conception: "The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall . . . be construed . . . either as actual limitations of such powers, or as inserted merely for greater caution."²⁵

The only question that remains is whether the enumerated rights standing alone are adequate to either of these two power-constraining tasks. The answer is as obvious today as it was to the Framers.²⁶ There is no telling in advance exactly how the powers authorized by the Necessary and Proper Clause may be abused. And, once the scheme of delegated powers is

24. Letter of James Madison to George Washington (Dec. 5, 1789), reprinted in Schwartz, *supra* note 10, at 432.

25. Madison, *supra* note 18, at 452. The entire passage appears at *supra* note 20.

26. Madison's original draft articulated this view as well:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people . . ."

Id.

eroded, there is no telling what rights the national government may violate. Because he shared other Framers' beliefs that the enumerated rights did not exhaust the rights of the people, Madison wrote the Ninth Amendment lest the absence of a right from the list lead to the inference that it had been surrendered up to the government.²⁷

Trying to preserve limited government without recourse to unenumerated rights retained by the people is a project doomed to failure. Thanks to James Madison's Ninth Amendment the Constitutional recognition of rights retained by the people cannot be denied.

THE NINTH AMENDMENT AND NATURAL RIGHTS

What then is the relation between the Ninth Amendment and natural rights? There is both a positive and a normative dimension to this relationship.

First, as I said in my remarks at the 1986 Federalist Society Symposium at Stanford Law School,²⁸ as a matter of positive constitutional law, the Ninth Amendment, and therefore the Constitution as a whole, assumes the validity of a philosophy of "first comes rights—then comes government" and implicitly rejects a "government first—rights second" philosophy. The Ninth Amendment speaks of rights that are "*retained* by the people" which means that the people had these rights prior to the formation of this government. It affirms the proposition that governments are established to *secure*, not to *create* rights.²⁹ If the view that people have rights independent of their creation by government may fairly be called a philosophy of "natural rights," then as a matter of positive law, the Ninth

27. In Madison's words:

It has been objected also against a bill of rights, that, by enumerating particular exceptions to the grant of power, it would disparage those rights which were not placed in that enumeration; and it might follow by implication, that those rights which were not singled out, were intended to be assigned into the hands of the General Government, and were consequently insecure. This is one of the most plausible arguments I have ever heard urged against the admission of a bill of rights into this system; but, I conceive, that it may be guarded against.

Id. at 456.

28. See Barnett, *Are Enumerated Constitutional Rights the Only Rights We Have?: The Case of Associational Freedom*, 10 HARV. J.L. & PUB. POL'Y 101 (1987).

29. I have also pointed out, however, that the Constitution does create certain "institutional" rights as further safeguards against governmental abuse. See *id.* at 108-110.

Amendment, and therefore the Constitution, assumes the legitimacy of a natural rights philosophy.

Consequently, as a matter of positive law a "government first—rights second" philosophy that ignores unenumerated rights provides a grossly distorted interpretation of the Constitution. Such a view converts a partial list of enumerated rights into what Stephen Macedo has called, "islands surrounded by a sea of governmental powers"³⁰—precisely the false interpretation that Hamilton and Wilson warned against. Given their objective of limiting the power of government, had they shared a "government first—rights second" philosophy, those who insisted on a Bill of Rights would never have settled for the few rights that were enumerated. Therefore, when evaluating legislation, at a minimum, we must look to the kinds of unenumerated rights that were thought to exist at the time of the framing.

There are at least three textual sources of unenumerated rights. First, certain rights are presupposed by provisions of the Constitution itself—for example, the rights to life, liberty, and property, as well as the obligation of contracts. Second, we may look to the rights that some state ratification conventions proposed be added to the new Constitution. Third, we may look to philosophical writings of the day. For example, James Wilson (an ardent opponent of enumerating rights) devoted an entire chapter of his treatise to natural rights.³¹

Text alone is not enough, however. The rule of law requires that legal rights be as internally consistent and coherent as possible. This means that we cannot escape the task of devising a theory that best explains the bulk of these rights and which tells us which of them are valid and which are not. A good example of this kind of approach is Richard Epstein's book on the Takings Clause of the Fifth Amendment.³² The claim that any legal system that strives for coherence must resort at some level to theory should shock no one. After all, the "rights-powers conception" of constitutional rights is itself just a theory offered to explain certain passages of the Constitution.

The other dimension of the relation between natural rights

30. S. MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 32 (rev. ed. 1987).

31. See J. Wilson, *Of the Natural Rights of Individuals*, in 2 *THE WORKS OF JAMES WILSON* 307 (J. Andrews ed. 1896).

32. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

and the Ninth Amendment is normative and concerns the legitimacy of legislation that results from the operation of constitutional processes. Why is it that any legislation (to use a phrase from Aquinas) binds a person "in conscience"³³ today? The mere fact that the individual cannot successfully resist the coercion of government does not explain why a citizen or government official is bound in conscience to obey legislation produced by constitutional processes, even if he or she could avoid a sanction. Might does not explain right; nor does the fact that a majority of some minority once cast a vote in favor of the Constitution.

If the Constitution imparts legitimacy on legislation such that legislation commands an ongoing moral obligation of obedience, it must be because the processes established by the Constitution are sufficiently in sync with a background set of individual rights, rights that are both procedural and substantive in nature, corresponding to what Lon Fuller called the internal and external moralities of law.³⁴ If this view of constitutional legitimacy is correct, then the Ninth Amendment helps to keep the institutions created by the Constitution in line with these background rights. The Ninth Amendment enhances the legitimacy of legislation by strengthening the link between enacted law that survives judicial review and the imperatives of justice based on individual rights.

What about the fear that openly protecting unenumerated rights will lead to abuses by the judiciary? For example, what would prevent judges from creating enforceable constitutional (as opposed to statutory) welfare rights? While this is a genuine concern, I suggest that the worst way to address the problem of judicial abuses is to deny that courts may protect unenumerated rights, for this would amount to a preemptive surrender of these rights to the far greater threat of legislative or executive abuses. After all, it is Congress, not the courts, that has created what it now refers to as "entitlements" programs.

Instead, the problem of judicial abuse is best addressed by strongly insisting upon three formal constraints on judicial power that restrict the scope of all constitutional rights. First,

33. T. AQUINAS, *SUMMA THEOLOGICA* in 20 GREAT BOOKS OF THE WESTERN WORLD 233 (1980).

34. See L. FULLER, *THE MORALITY OF LAW* 96-97 (rev. ed. 1969).

"substantive" constitutional rights are negative not positive.³⁵ They define protected domains of discretionary conduct with which government may not interfere. "Procedural" constitutional rights may be positive, but they limit the way that government not private citizens exercises its proper powers.³⁶ Second, in protecting these rights, judges may exercise neither legislative nor executive powers. They ought not, for example, raise taxes or appropriate funds. Third, judges have only the power to strike down legislation or executive actions. Judges may only say "no"—and judicial negation is not legislation.

So-called constitutional welfare rights would violate each of these constraints. They are positive in nature, require the appropriation and expenditure of tax revenues, and cannot be implemented by striking down legislation. Of course, when legislatures decide to dispense benefits through administrative agencies or to provide government "services," judges are not creating entitlements *de novo* when they insist that such schemes be administered in a manner that is consistent with principles of due process and equal protection. This is the price we pay for using public as opposed to private institutions to achieve social goals. Any such constitutional rights are ultimately statutory in their origin.

Although the unenumerated rights of the Ninth Amendment would have an important role to play even within a government whose powers were strictly limited, until the day that we reestablish this constitutional structure, our problem is not that judges protect too many unenumerated rights from governmental interference, but that they protect all too few. While there are plausible reasons why some are reluctant to extend judicial review to the rights retained by the people,³⁷ the rights-powers conception of the Ninth Amendment is not one of them. A power-constraint conception of constitutional rights best explains what Madison was doing when he drafted the amendments to the Constitution, including the provision that eventually became the Ninth Amendment. Arguments for the

35. See Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864 (1986).

36. See Barnett, *Foreword: Four Senses of the "Public-Private" Distinction*, 9 HARV. J.L. & PUB. POL'Y 267 (1986) (discussing the different meanings of the distinction between "public" and "private" law).

37. Those wishing to read the seminal scholarship on both sides of this issue should see *THE RIGHTS RETAINED BY THE PEOPLE: THE HISTORY AND MEANING OF THE NINTH AMENDMENT* (R. Barnett ed. forthcoming). The latest round of the debate can be found in the *Symposium on Interpreting the Ninth Amendment*, 64 CHI.-KENT L.REV. 37-268 (1988).

rights-powers conception conceal what is actually at issue: the merits of Madison's effort to constrain the powers of government and protect liberty by protecting enumerated and unenumerated constitutional rights.